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No. 87-538

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

BRENDA SIMPSON, Et Al. - - - Petitioners

versus

**LOUISVILLE AND JEFFERSON COUNTY
METROPOLITAN SEWER
DISTRICT** - - - Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

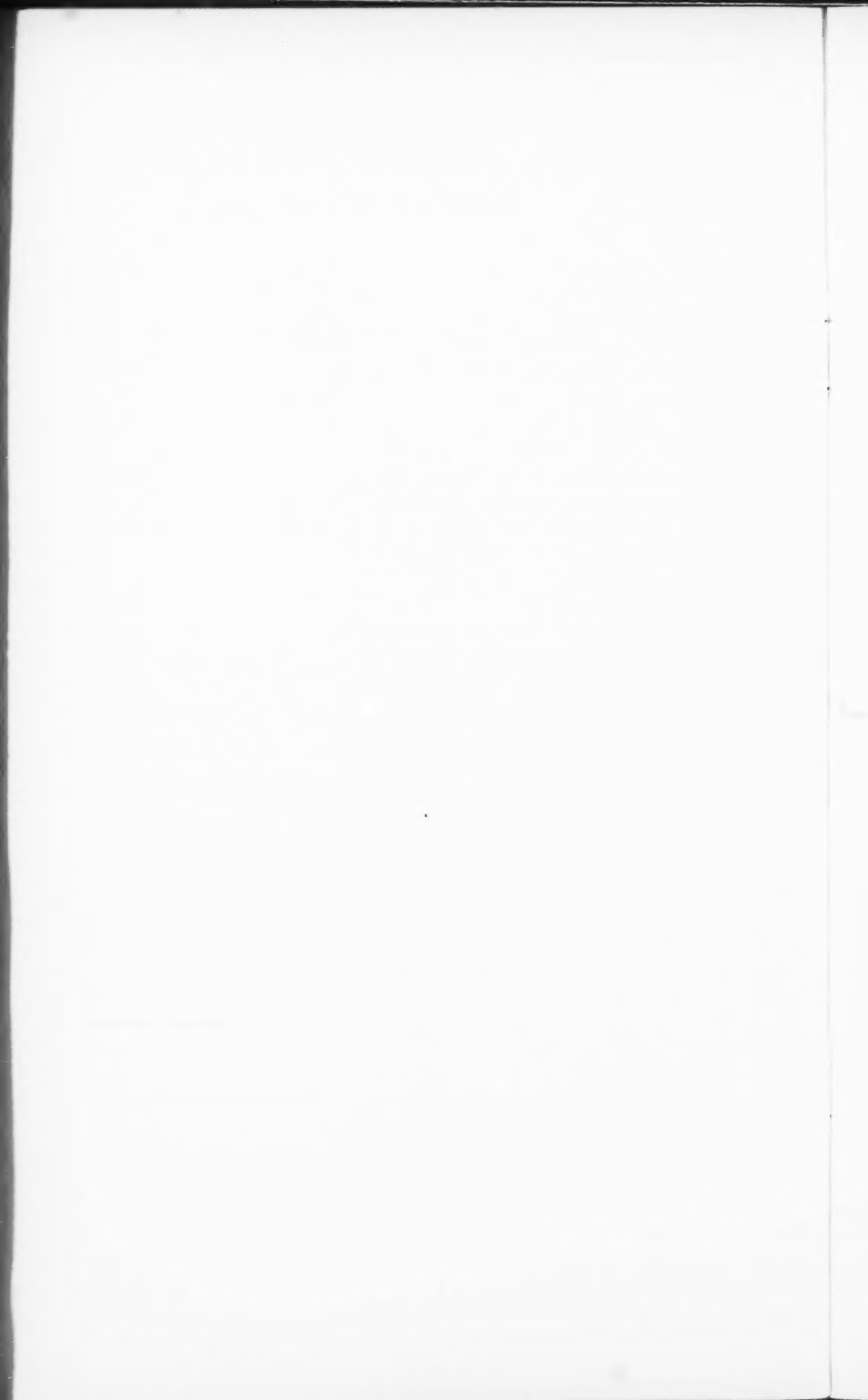
Whether the Kentucky Supreme Court holding that a state political subdivision is immune from alleged tortious conduct violates the unlawful taking provision of the Fifth and Fourteenth Amendments to the United States Constitution.

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No. 87-538

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

BRENDA SIMPSON, Et Al. - - - *Petitioners*

v.

LOUISVILLE AND JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On May 1, 1983, petitioners sustained damages as a result of rainfall surface water flooding related to a malfunction of a sluice gate flood control system.

On May 2, 1983, petitioners filed the subject action in the Jefferson Circuit Court. In addition to a negligence count, petitioners claimed that respondent's "... construction, maintenance and operation of its sluice gates wrongfully, unlawfully, and unconstitutionally took, damaged, and otherwise devalued Petitioner's common law right of drainage as recognized under Kentucky law."¹

¹Brief for Petitioners, at 5.

On June 19, 1984, the trial court entered summary judgment² holding respondent was immune from the liability alleged in petitioners' complaint. On June 7, 1985, the Court of Appeals of Kentucky³ reversed and remanded⁴ the action to the trial court holding that an interim decision⁵ of the Kentucky Supreme Court, limiting sovereign immunity of cities, also applied to respondent.

On April 30, 1987, the Supreme Court of Kentucky reversed the Court of Appeals of Kentucky⁶ and held that respondent was immune from the alleged tort liability.

Petitioners did not suggest that the property damage constituted a public use taking of their private property, within the meaning of the Fifth and Fourteenth Amendments, in their memorandum to the trial court, their brief to the Court of Appeals of Kentucky, or their brief to the Supreme Court of Kentucky.⁷ After the adverse decision in the Kentucky Supreme Court, petitioners sought a rehearing and first argued: "Also, under the Fifth and Fourteenth Amendments of the Constitution of the United States, a disturbance of drainage rights by a governmental entity is an unconstitutional taking that must be compensated."⁸

²Brief for Petitioners, at 24a.

³The state intermediate appellate court.

⁴Brief for Petitioners, at 21a.

⁵*Gas Service Co., Inc. v. City of London*, 687 S. W. 2d 144 (Ky. 1985).

⁶Brief for Petitioners, at 1a.

⁷Brief for Petitioners, at 29a, 38a, and 46a.

⁸Brief for Petitioners, at 55a.

SUMMARY OF REASONS WHY WRIT SHOULD BE DENIED

The petitioners' writ should be denied on the grounds that:

1. Petitioners do not allege nor can they demonstrate any special and important reason for review of the opinion of the Supreme Court of Kentucky. While petitioners argue that review is appropriate pursuant to Supreme Court Rule 17.1(c), petitioners do not allege:

A. An important federal question unsettled by this Court; or

B. A decision of a federal question in conflict with applicable decisions of this Court.

2. Petitioners' action was brought under state law for money damages resulting from alleged negligent tortious conduct, and is not an action brought under federal law⁹ for damages resulting from a governmental taking of private property for public use, without just compensation.

3. Petitioners did not preserve an issue or error for review; petitioners first raised federal constitutional issues in their petition for rehearing after an adverse decision in the Supreme Court of Kentucky.

⁹Petitioners' action for governmental taking was alleged and briefed in the trial and appellate courts of Kentucky pursuant to Sections 13 and 242 of the Kentucky Constitution only.

REASONS FOR DENIAL OF THE WRIT

This action was brought by petitioners under state law to recover money damages for alleged tortious conduct. Petitioners also alleged that their damages constituted a taking prohibited by the Kentucky Constitution. The trial court dismissed based on respondent's sovereign immunity. After some three years of appellate review, the Kentucky Supreme Court rejected both contentions and affirmed the trial court judgment. Petitioners now attempt to circumvent the Kentucky immunity law by characterizing their tort damages as a taking of private property for public use prescribed by the United States Constitution.

A. The Issue Presented By Petitioners Is Not Sufficiently Special and Important to Warrant Certiorari Review.

This case presents issues which arise out of and are controlled by state law. This case does not present a decision of an important question of federal law for review nor does it present a decision of federal question which is in conflict with any applicable decision of this Court.

Petitioners alleged one federal cause of action under 42 U.S.C. § 1983 in their First Amended Consolidated Complaint.¹⁰ Petitioners abandoned this claim in the appellate courts of Kentucky. Petitioners did not raise the federal taking question until they petitioned for rehearing in the Kentucky Supreme Court.

¹⁰Brief for Petitioners, at 59a.

There is no decision or question of federal law to be reviewed by this Court. This action was pleaded in tort and under the constitutional law of the Commonwealth of Kentucky. The action has been decided under the controlling authorities of the common law, statutes and Constitution of the Commonwealth of Kentucky. The federal question framed by petitioners is a matter of settled state law.¹¹

This action presents a question of importance to the parties. This action does not present a question involving unsettled principles of importance to the public nor does it present a question involving conflicting decisions of state and federal courts. The writ should be denied. *Rice v. Sioux City Memorial Parks Cemetery, Iowa*, 349 U. S. 70 (1955).¹²

**B. Petitioners Claim is a Tort Action Controlled
by State Law.**

Petitioners argue that fundamental precepts of the Fifth and Fourteenth Amendments require that they be permitted "their day" in court to show an unconsti-

¹¹See Subpoint B.

¹²Delivering the opinion of this Court, Justice Frankfurter opined that:

A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.

Id. at 74.

tutional taking of private property for public use.¹³ While petitioners did not timely raise this federal question argument below, they additionally characterized their tort claim as one involving an inverse or reverse condemnation taking prescribed by Sections 13 and 242 of the Kentucky Constitution. The Kentucky Supreme Court refused to accept the mischaracterization. The case was decided for what it is, a tort claim.

The Kentucky Court of Appeals addressed and rejected the mischaracterization argument more than 70 years ago in *T. B. Jones & Co. v. Ferro Concrete Const. Co.*, 154 Ky. 47, 156 S. W. 1060 (1913). There suit was brought against the commissioners of sewerage of Louisville for flood damages caused by negligent acts of the commission's contractors. The claimant insisted that the damages amounted to a taking or injury of property and that compensation was constitutionally required. In rejecting the inverse condemnation claim and defining the action as one of tort, the court held:

[T]he constitutional provision is that municipal or other corporations invested with the privilege of taking property for public use shall make just compensation for property taken, injured, or de-

¹³Petitioners rely on *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U. S. 266 (1897); *Lehman v. Williams*, 193 S. W. 2d 161 (Ky. 1946); *Penn Central Transportation Co. v. New York City*, 438 U. S. 104, *reh'g denied*, 439 U. S. 883 (1978); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U. S. 155 (1980) in support of their argument that a taking has occurred. Two of these cases have holdings contrary to the argument of petitioners. None of the cases are remotely factually similar to the subject action.

stroyed by them. In other words, the provision has reference to property taken under the power of eminent domain; it has no reference to property which was not taken and could not be taken under the power of eminent domain. It is not the purpose of the constitutional provision to make municipal corporations liable for all injuries to property inflicted by the negligence of their servants, irrespective of the fact that the corporation was in this work acting as an arm of the state government and discharging and governmental function.

Id. at 1062.¹⁴

The petitioners' argument here is even less persuasive in the context of a federal question.¹⁵ Indirect or consequential damages resulting from flooding "caused" by a governmental entity are not compensable as a taking of private property for public use

¹⁴The Kentucky courts have consistently recognized the distinction between tort and governmental takings. *V.T.C. Lines, Inc. v. City of Harlan*, 313 S. W. 2d 573 (Ky. 1957); *Commonwealth v. Davidson*, 383 S. W. 2d 346 (Ky. 1964); *Hempel v. Lexington-Fayette Urban Co. Government*, 641 S. W. 2d 51 (Ky. App. 1982).

¹⁵The Fifth Amendment of the United States Constitution provides, in pertinent part:

[N]or shall private property be taken for public use, without just compensation.

Section 242 of the Kentucky Constitution has broadened the protection provided in the Fifth Amendment by providing, in pertinent part:

Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property *taken, injured or destroyed* by them. . . . (Respondent's emphasis.)

under the Fifth and Fourteenth Amendments to the Constitution of the United States.

In 1924, this Court addressed the tort versus condemnation characterization issue in a case involving governmental liability for flooding damages. In *Sanguinetti v. United States*, 164 U. S. 146, 149-50 (1924), this Court held:

[I]n order to create an enforceable liability against the government, it is at least necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property. . . . If the case were one against a private individual, his liability, if any, would be in tort.

In 1982, this Court reaffirmed its position in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 428 (1982), stating that:

[T]his Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the former situation.¹⁶

In order to recover, petitioners must show injury immediately following or occurring simultaneously with

¹⁶Citing, *United States v. Cress*, 243 U. S. 316 (1917); *Sanguinetti*, 264 U. S. at 149.

the construction of the instrumentality causing the damage and the injury must be permanent or inevitably recurring. *United States v. Cress*, 243 U. S. 316, 328 (1917).

The subject sluice gates were constructed in 1975 in compliance with the requirements of the United States and the Kentucky Environmental Protection Agencies. The flooding property damages¹⁷ occurred nine years after the construction of the sluice gates.¹⁸

In *Sanguinetti*, the petitioner complained of flooding in 1911 and all successive years excepting 1912 and 1913. *Id.*, 264 U. S. at 147. In *North-Counties Hydro-Electric Co. v. United States*, 151 F. Supp. 322, 323 (Ct. Cl. 1957), *cert. denied*, 355 U. S. 882 (1957), the court held that two floodings 10 years apart do not constitute a taking. It was necessary for the plaintiff to show that such floodings would inevitably recur.

Petitioners' cause of action was pleaded in tort, judicially resolved as a tort, and should be disposed of here as a tort. Respondent has not taken nor obtained a right or interest in petitioners' property. It is neither a prescribed taking under the Kentucky Constitution nor the United States Constitution.

¹⁷Most of petitioner's damages are in respect to personal property.

¹⁸While some of the petitioners had flood damages in 1977, the cause was not related to the cause of the flooding on May 1, 1983, some six years later.

**C. Petitioners' Have Not Preserved Issue or
Error For Review.**

Petitioners correctly represent that: “[P]etitioners claimed that MSD’s construction, maintenance, and operation of its sluice gates wrongfully, unlawfully, and unconstitutionally took, damaged, and otherwise devalued Petitioners’ common law right of drainage as recognized *under Kentucky law*.”¹⁹ (Respondent’s emphasis.) Petitioners did not raise any argument under the Fifth and Fourteenth Amendments to the United States Constitution until after the Supreme Court of Kentucky had decided the case in favor of respondent. Petitioners argue that the issue has been preserved for review by suggesting:

In Petitioners’ brief in the Court of Appeals of Kentucky (Appendix, p. 38a), they supported their constitutional argument by citing *Lehman v. Williams*, 193 S. W. 2d 161 (Ky. 1946). There, the then highest court of Kentucky relied, in part, on the Fifth and Fourteenth Amendments to the United States Constitution in reversing the trial court’s dismissal of a complaint seeking compensation for an alleged taking.²⁰

In fact, petitioners cited *Lehman* in each of their briefs to the trial and appellate courts. In each brief, *Lehman* was cited in a footnote as part of a string citation in support of petitioners’ argument concerning

¹⁹Brief for Petitioners, at 5.

²⁰Brief for Petitioners, at 5-6.

the Kentucky Constitution.²¹ At no time prior to petitioners' brief for writ of certiorari to this Court, had the petitioners relied on *Lehman* in support of a contention that there had been an uncompensated taking within the meaning of the Fifth and Fourteenth Amendments. At no time prior to the filing of its petition for rehearing in the Supreme Court of Kentucky did petitioners suggest that there had been an unconstitutional taking within the meaning of the Fifth and Fourteenth Amendments. Petitioners have failed to preserve issue or error for review by the Court. The petition should be denied. *Ellis v. Dixon*, 349 U. S. 458, *reh'g denied*, 350 U. S. 855 (1955).

²¹Brief for Petitioners, at 37a, 43a, and 51a.

CONCLUSION

For each of the foregoing reasons, the Petition for a Writ of Certiorari to the Supreme Court of Kentucky should be denied.

Respectfully submitted,

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